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Supreme Court, U.S.
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No. 06-

In The

Supreme Court of the United States

J&G SALES, LTD,

Petitioner

v.

MICHAEL J. SULLIVAN,
ACTING DIRECTOR
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a "demand letter" to federally licensed firearms dealers requiring them to provide the agency with information from records maintained by the dealers exceeds the agency's authority under 18 U.S.C. § 923(g)(5)(A) in view of the statutory scheme enacted by Congress.

PARTIES TO THE PROCEEDING

The parties are J&G Sales, Ltd. and Michael J. Sullivan, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit reversing the grant of summary judgment to Petitioner is published at 473 F.3d 1043 (9th Cir. 2007) and is printed in the Appendix ("App.") at App. 1a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit reversed a grant of summary judgment on January 16, 2007. Justice Kennedy extended until June 15, 2007 the time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES

> The Attorney General, when he has reasonable cause to believe a violation of this chapter has occurred and that evidence thereof may be found on such premises, may, upon demonstrating such cause before a Federal magistrate judge and securing from such magistrate judge a warrant authorizing entry, enter during business hours the premises (including places of storage) of any . . . licensed dealer . . . for the purpose of inspecting or examining - (i) any records or documents required to be kept by such . . . dealer . . . under this chapter or rules or regulations under this chapter . . . .

18 U.S.C. § 923(g)(1)(A)(i).

> The Attorney General may inspect or examine the inventory and records of a . . . licensed dealer without such reasonable cause or warrant - (i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee; (ii) for ensuring compliance with the record keeping requirements of this chapter - (I) not more than once during any 12-month period; or (II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or (iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

18 U.S.C. § 923(g)(1)(B).

> Each licensee shall prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling two or more, to an unlicensed person. The report shall be prepared on a form specified by the Attorney General and forwarded to the office specified thereon and to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other

> disposition took place, not later than the close of business on the day that the multiple sale or other disposition occurs.

18 U.S.C. § 923(g)(3)(A).

> Where a firearms or ammunition business is discontinued and . . . discontinuance of the business is absolute, such records shall be delivered within thirty days after the business discontinuance to the Attorney General. However, where State law or local ordinance requires the delivery of records to other responsible authority, the Attorney General may arrange for the delivery of such records to such other responsible authority.

18 U.S.C. § 923(g)(4).

> Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

18 U.S.C. § 923(g)(5)(A).

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by the Attorney General for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

18 U.S.C. § 923(g)(7).

STATEMENT OF THE CASE

On August 4, 2003, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") sent J&G Sales, Ltd. ("J&G") a "demand letter," directing J&G to provide the following information regarding secondhand firearm acquisitions: the name of the manufacturer and/or importer; the acquisition date; the model; the caliber or gauge; and the serial number. J&G was directed not to provide either the name of the person from whom the secondhand firearm was acquired or to whom the firearm was transferred. J&G was the recipient of a "demand letter" because there had purportedly been sixteen (16) trace requests to J&G, with a "time-to-crime"[1] of three years or less. The demand letter instructed J&G to submit its report for 2002 secondhand firearms acquisitions to the National Tracing Center within thirty days, and quarterly reports thereafter until it was informed otherwise. Demand letters were also sent to some 450 federally licensed firearms dealers throughout the United States.

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[1] The "time-to-crime" is the time between when a firearm is initially sold and when it is recovered by law enforcement.

On November 18, 2003, J&G filed a complaint seeking declaratory judgment and injunctive relief against ATF. With respect to its request for declaratory judgment, J&G asserted that the demand letter exceeded the Bureau's statutory authority, constituted an arbitrary and capricious agency action, and violated due process of law. With respect to its request for injunctive relief, J&G sought to prohibit ATF from penalizing it for its refusal to comply with the demand letter and to require that ATF destroy any records that J&G had already submitted.

On January 26, 2004, ATF filed a "Motion to Dismiss or for Summary Judgment," which the district court construed as a motion for summary judgment. The district court found that the "demand letter" was an unlawful request for J&G's records because it exceeded ATF's statutory authority and enjoined ATF from seeking to enforce the letter that it issued to J&G. Despite determining that ATF lacked authority to issue the demand letter, the district court granted summary judgment to ATF on all other grounds, including that ATF's method for targeting particular firearms dealers to receive demand letters was not arbitrary and capricious.

ATF appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the district court, holding that ATF had statutory authority for the "demand letter."

ARGUMENT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS THAT REGULATORY STATUTES BE INTERPRETED AS A SYMMETRICAL AND COHERENT SCHEME

1) The court of appeals stated that ATF "grounds its statutory authority to issue the type of demand letter that it sent to J & G Sales in 18 U.S.C. § 923(g)(5)(A)." 473 F.3d at 1048. Section 923(g)(5)(A) provides:

> Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

While acknowledging that J&G argued that § 923(g)(5)(A) "must be read within § 923's broader statutory context" (473 F.3d at 1048), the court of appeals neglected to apply this Court's teachings on statutory construction.[2]

2) A court's objective "is to ascertain the congressional

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[2] The court of appeals relied on *Blaustein & Reich, Inc. v. Truscott*, 365 F.3d 281 (4th Cir. 2004), which held that ATF had statutory authority for the "demand letter." *Blaustein & Reich, Inc.* did not, however, address whether there were limits on § 923(g)(5)(A) when viewed in light of the statutory scheme.

intent and give effect to the legislative will." *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975). Further, it "is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). More recently, this Court has explained:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ."

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)(citations omitted).

In *Mastro Plastics Corp. v. Labor Board,* 350 U.S. 270, 285 (1956), this Court rejected an interpretation of a statute which read words in isolation, as the court of appeals did here:

> If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but

> look to the provisions of the whole law, and to its object and policy." (citations omitted).

350 U.S. at 285.

In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court held that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." 439 U.S. at 392. See also *United States v. Menasche*, 348 U.S. 528, 538-539 (1955): "'The cardinal principle of statutory construction is to save and not to destroy.' (citation omitted). It is our duty 'to give effect, if possible, to every clause and word of a statute' (citation omitted), rather than to emasculate an entire section, as the Government's interpretation requires." Further, "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Thus, in determining the scope of ATF's authority under § 923(g)(5)(A), a court must look not only to the language of § 923(g)(5)(A) itself, as the court of appeals did, but to other statutory provisions to ascertain Congress' intent and give effect to the legislative will.

3) Section 923(g)(5)(A) was enacted as part of the Firearms Owners' Protection Act ("FOPA"), P.L. 99-308, 100 Stat. 449 (1986). FOPA, however, also amended § 923(g)(1)(A)(i) to require reasonable cause and a warrant "for the purpose of inspecting or examining" licensee records; amended § 923(g)(1)(B) to authorize inspection of licensee

records "without such reasonable cause or warrant" i) in the "course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee"; ii) for "ensuring compliance with the record keeping requirements of this chapter" by an annual inspection or "with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee"; and iii) to authorize inspection of licensee records when "required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." In 1994, Congress enacted § 923(g)(7), which requires licensees to provide information from their records when requested by ATF "as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation."

The court of appeals' construction of § 923(g)(5)(A) violates the canons of construction articulated in *Davis v. Michigan Dept. of Treasury, supra, FDA v. Brown & Williamson Tobacco Corp., supra, Mastro Plastics Corp. v. Labor Board, supra, Colautti v. Franklin, supra, United States v. Menasche, supra,* and *Duncan v. Walker, supra,* by effectively rendering a nullity the specific grants of authority established by § 923(g)(1)(A), § 923(g)(1)(B)(i), § 923(g)(1)(B)(iii), and § 923(g)(7).

Indeed, under the reasoning of the court of appeals, ATF could simply send a demand letter for records it wished to inspect or examine, and not comply with the reasonable cause and warrant requirement of § 923(g)(1)(A) or the express limitations on warrantless searches under § 923(g)(1)(B)(i) (in the "course of a reasonable inquiry during the course of a

criminal investigation of a person or persons other than the licensee") and § 923(g)(1)(B)(iii) ("determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation."). Such an action would plainly be an evasion of Congress' carefully crafted scheme for ATF's access to licensee records.

The court of appeals observed that § 923(g)(1)(B) and § 923(g)(7) each "serves quite distinct purposes from the demand letter." 473 F.3d at 1050. Section 923(g)(1)(B), according to the court of appeals:

> governs when Bureau officials may physically gain entry onto an FFL's premises in order to inspect record information. When the Bureau merely sends a demand letter requesting certain limited information, no physical intrusion whatsoever occurs. This is a difference that matters.

Id.

While it is true that, when ATF sends a demand letter requesting information, no physical intrusion occurs, this is not a difference that matters. Congress' enactment of § 923(g)(1)(A) and (B) in FOPA placed limits on ATF's ability to obtain record information, as evidenced by the fact that the very purpose of the inspections authorized by § 923(g)(1)(A)

and (B) is to obtain access to records.[3] *Cf. Colonnade Corp.* v. *United States*, 397 U.S. 72 (1970), where the statute authorized searches for "any articles or objects subject to tax" (397 U.S. at 77). Accordingly, because the demand letter is used to obtain record information, the limitations on access to records enacted by Congress in § 923(g)(1)(A) and (B) are implicated in construing Congress' intent with respect to the scope of § 923(g)(5)(A) .

With respect to § 923(g)(7), the court of appeals states that "§ 923(g)(7) imposes speedy reporting requirements on FFLs in the context of criminal investigations . . . ." 473 F.3d at 1050. But the court of appeals' construction of § 923(g)(5)(A) permits § 923(g)(5)(A) to be used to obtain speedy reporting from licensees in the context of criminal investigations. Thus, the fact that § 923(g)(7) "imposes speedy reporting requirements on FFLs in the context of criminal investigations" does not establish that the reporting required by § 923(g)(7) serves a distinct purpose from the demand letter. Rather, the court of appeals' construction of § 923(g)(5)(A) shows that § 923(g)(7) does not serve a distinct purpose from the demand letter. Accordingly, the court of appeals' construction of § 923(g)(5)(A) is inconsistent with § 923(g)(7).

The court of appeals' conclusion not only permits ATF to evade the limitations on access to records enacted by

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[3] *United States v. Biswell*, 406 U.S. 311 (1972) upheld the constitutionality of the previous version of § 923(g) because inspections of federally licensed firearms dealers were "carefully limited in time, place, and scope" (406 U.S. at 315) and "specifically authorized by statute." 406 U.S. at 317. Congress was entitled, however, to place restrictions on ATF's authority to conduct inspections by withdrawing statutory authority.

Congress in § 923(g)(1)(A) and (B)(ii), but also allows ATF to circumvent the limits of § 923(g)(1)(B)(i) and (iii) by sending a demand letter for records without there being any criminal investigation. Similarly, the court of appeals' holding would allow ATF to circumvent § 923(g)(7)'s "bona fide criminal investigation" requirement and compel information to be reported within 24 hours through the demand letter provision. Accordingly, the express limitations on ATF's authority in § 923(g)(1)(A) and (B), and § 923(g)(7), must thus be construed as limitations on ATF's authority under § 923(g)(5)(A) to avoid them being rendered nullities.

4) The construction of § 923(g)(5)(A) adopted by the court of appeals is also inconsistent with § 923(g)(3)(A) (submission of reports of multiple firearms sales) and § 923(g)(4) (submission of out of business records) because, under that construction, § 923(g)(3)(A) and § 923(g)(4) are rendered superfluous and insignificant in that ATF could use the authority of § 923(g)(5)(A) to require the submission of reports of multiple firearms sales and of out of business records. That Congress deemed necessary the enactment of both § 923(g)(3)(A) and § 923(g)(4) reveals that Congress did not intend that § 923(g)(5)(A) have the broad reach ascribed to it by the court of appeals.

5) While the above makes plain that Congress intended that § 923(g)(5)(A) not be an open ended grant of authority, the uncertain interplay of the various provisions of the statutory scheme render the scheme ambiguous as to the precise limits of § 923(g)(5)(A). As noted in *Robinson v. Shell Oil Co.*, 519 U.S. 337(1997) the "plainness or ambiguity of statutory language is determined by reference to the language itself, the

specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341. See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context"). Such lack of clarity can be resolved by resort to the legislative history.[4]

As *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) noted of another statute:

> Even if the language of § 526 clearly covered all affiliates of foreign manufacturers, "[i]t is a `familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" It is therefore appropriate to turn to our other "traditional tools of statutory construction" for clues of congressional intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

486 U.S. at 300.

Thus, a court must "look first to the statutory language and then to the legislative history if the statutory language is

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[4] Even if resort to the legislative history is not required, it may be reviewed to confirm the statutory construction. *Cf. Negonsott v. Samuels*, 507 U.S. 99, 106 (1993)("Although we think resort to secondary materials is unnecessary to decide this case, the legislative history of the Kansas Act supports our construction"); *Airports Auth. v. Citizens for Noise Abatement*, 501 U.S. 252, 267 (1991)("Although the legislative history is not necessary to our conclusion that the Board members act in their official congressional capacities, the floor debates in the House confirm our view").

unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

6) The original demand letter regulation (27 C.F.R. § 178.126) was promulgated under, and became effective on the same date as, the Gun Control Act of 1968, December 16, 1968. § 105(a), P.L. 90-618, 82 Stat. 1213 (1968); 33 F.R. 18555, 18556 (Dec. 14, 1968). Harold Serr, Director of the Alcohol and Tobacco Tax Division, wrote to Senator Frank Church, on December 17, 1968:

> [U]nder no circumstances does the Alcohol and Tobacco Tax Division intend to require licensed firearms dealers to submit all records of firearms transactions to a central location. This would be in effect gun registration and the Congress clearly showed its desires in this area when gun legislation was voted on.

131 Cong. Rec. S9129 (July 9, 1985).

Serr wrote that the demand letter regulation would be used "when we become aware of violations of the law by an unscrupulous dealer." *Id.* An example would be a dealer illegally selling handguns to out-of-state residents who stated that "they could give him any name they chose." In such a situation, "we would require the dealer to submit records of his sales, not for the purpose of registration, but for the purpose of proceeding against the dealer for a criminal violation of the law." *Id.* Serr emphasized, however, that ATF had "no intention of requiring law-abiding gun dealers to report their firearms transactions to us." *Id.*

Section 103 of FOPA, 100 Stat. 454, amended § 923(g)(1)(A) to provide that licensees "shall not be required to submit to the Secretary reports . . . except as expressly required by this section." Such records "include, for instance, multiple sales reports and certain informational reports used in connection with tracing." S.Rep. 98-583, at 15. "See, e.g., proposed 18 U.S.C. 923(g)(4)and (5),[5] discussed in more detail infra." *Id.* n.32.

Subparagraph (4) would be enacted as the demand letter provision. § 103 of FOPA, 100 Stat. 455. That provision "is based on existing Treasury regulations describing activities which facilitate the Secretary's ability to trace the disposition of firearms in connection with criminal investigations."[6] S.Rep. 98-583, at 17. The Report continues:

> The purpose of Paragraph (4) is to clarify and ensure the Secretary's authority to conduct legitimate tracing activities in connection with bona fide criminal investigations. The authority granted to the Secretary under this Paragraph is intended to provide access to all

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[5] Subparagraph (5) would be enacted as § 923(g)(3), which provides that a licensee shall report to the Secretary the sale of two or more handguns in a five-day period.

[6] In 1994, Congress enacted § 923(g)(7), which created an explicit duty of a licensee to respond to a trace request, "orally or in writing, as the Attorney General may require" within 24 hours and authorized the Attorney General to make such requests by telephone. A trace request pursuant to § 923(g)(7) was, however, only for the purpose of "determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation."

> information legitimately needed in sensitive criminal investigations, such as the investigation of President Reagan's attempted assassination. However, because of the breadth of the authority granted, limitations on the use of such information, which do not exist under current regulations, were included to restrict any potential for the abuse of the rights of law-abiding licensees.

Id. at 18.

The use of § 923(g)(5)(A) in relation to traces would be limited not only to "bona fide criminal investigations," but would be further confined by what would be enacted as § 926(a).[7] As the Senate report, which referred to the demand-letter provision as the "tracing provision[]" below, further explained:

> The multiple sales, out-of-business records, and tracing provisions, which, in certain respects, codify existing regulations, were included in the Committee amendment to achieve an appropriate balance between legitimate law enforcement needs and the Committee's

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[7] § 926(a) provides in part that the Attorney General may not promulgate a "rule or regulation" which would:

> require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States . . . .

> determination to substantially restrict the circumstances under which inspections are authorized. This, in turn, reduces the potential for unwarranted intrusions into the business affairs of law-abiding licensees. However, . . . the authority granted under 18 U.S.C. 923(g)(3), (4) and (5), as well as that contained in paragraph (1), as amended, are not to be construed to authorize the United States . . . to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.

Id. at 18.

Specifically, § 106 of FOPA, 100 Stat. 459-60, amended § 926(a) to prohibit BATF from requiring that licensee records "be recorded at or transferred to" a government facility or establishing any registration system, but allowing the authority to conduct traces "in the course of a criminal investigation." The report states that "this 'tracing' authority is codified in the Committee's amendment," obviously referring to what would be enacted as § 923(g)(5)(A). Senate Report 98-583 at 27.

Senator Orrin Hatch, floor manager of FOPA, explained of the demand letter regulation: "The Senate bill explicitly codifies regulations permitting tracing of firearms used in crimes." 132 Cong. Rec. S5351 (May 6, 1986).

In later Senate debate, Senator Hatch explained of § 926(a) that "the authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." 131 Cong. Rec. S8691 (June 24, 1985). Senator Hatch also clarified the understanding of the 1968 demand letter regulation which FOPA would codify as follows:

> *In order to facilitate tracing of firearms used in violent crimes, licensed dealers currently are required to provide the Secretary of Treasury with information about specific weapons upon request.* Further a dealer must report multiple handgun sales to the same person which occur within 5 consecutive business days, and if the dealer is going out of business, he must send his records to the BATF rather than destroy or otherwise dispose of them. These tracing authorities are included currently in Federal regulations.

131 Cong. Rec. S8691 (June 24, 1985) (emphasis added).

Senator Hatch added that "the authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." *Id.* Hatch stated about § 923(g)(5)(A) that "Congress had no intent to require all law-abiding gun dealers to report all their firearms transactions" to BATF. *Id.* at S9129

(July 9, 1985).[8] For the purpose of "clarifying the record information submission requirement for firearms licensees," Senator Hatch inserted into the record ATF Director Serr's explanation of the purpose of the demand letter regulation quoted above.

Not a single senator voiced a contrary view of the purpose of § 923(g)(5)(A). Thus, the canon of statutory construction that it "is the sponsors that we look to when the meaning of the statutory words is in doubt," *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395 (1951), applies with particular emphasis with respect to § 923(g)(5)(A).

When the bill was being considered by the House after Senate passage, Edward T. Stevenson, Deputy Assistant Secretary, Enforcement and Operations, Department of the Treasury, explained the understanding of the United States of the language which became § 923(g)(5)(A):

> Initially, the bill could be interpreted to remove the statutory authority by which the Government may require licensees to report information from required records. Based on this authority, licensees are currently required by regulations to provide information about

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[8] Senator James McClure, the chief FOPA sponsor, provided the following concise explanation: "The central compromise of the Gun Control Act of 1968 – the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments." 131 Cong. Rec. S9163-64 (July 9, 1985).

> particular firearms transactions on request, to report multiple sales of handguns to the same person, and to turn in to the Government out-of-business records upon ceasing business. Under S. 49, as passed by the Senate, these existing reporting requirements would be preserved and now specifically required by statute.

Legislation to Modify the 1968 Gun Control Act: Hearings Before the Committee on the Judiciary, House of Representatives, 99th Cong., 1st & 2d Sess., 1139 (1986) (emphasis added).

As discussed, *supra*, the "existing reporting requirements" referred to by Deputy Assistant Secretary Stevenson were "existing Treasury regulations describing activities which facilitate the Secretary's ability to trace the disposition of firearms in connection with criminal investigations." S.Rep. 98-583, at 17. Thus, it was the clear understanding of both Congress and the executive branch prior to the enactment of § 923(g)(5)(A) that both the original regulation and the statute as enacted by FOPA were limited in scope to (1) information from dealers who were in violation of the law, and (2) information from any dealers about specific firearms dispositions necessary for bona fide criminal investigations.

Accordingly, the only reading of § 923(g)(5)(A) which does not render a nullity the limitations established by § 923(g)(1)(A) and (B), § 923(g)(3)(A), § 923(g)(4), and § 923(g)(7), and which allows all provisions to fit "'into an harmonious whole'" (*Brown & Williamson*, *supra*, 529 U.S. at

133), is to read the record submission authority in § 923(g)(5)(A) as authorizing ATF to require the submission of information needed "to conduct legitimate tracing activities in connection with bona fide criminal investigations." S.Rep. 98-583, 98th Cong., 2d Sess., at 18 (1984).[9] To construe § 923(g)(5)(A) to authorize ATF to demand records for tracing which are not in the course of a bona fide criminal investigation would violate the basic rule of statutory construction that, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000). See also *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)("It is familiar law that a specific statute controls over a general one"). As ATF does not, however, contend that the record information demanded is required for determining the disposition of firearms in the course of a bona fide criminal investigation, ATF exceeds its authority under § 923(g)(5)(A) in demanding the record information it demands here.

6) The reason given by the demand letter applies to the entire class of firearms licensees: "Without the information we are requesting, ATF would not be able to trace these secondhand guns because they have passed through the hands of one or more nonlicensed purchasers." This situation exits, however, because that is the way Congress wrote the law, not due to any fault of compliant licensees which received the demand letter. If that is an enforcement problem, it is for

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[9] "There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991).

Congress to solve, not ATF.

ATF, however, now seeks to "improve on" the statutory scheme devised by Congress. Indeed, it is telling that, in 1999, the Administration proposed a bill that would have required licensees "to submit" to ATF "identifying information for used firearms taken into inventory," the information now sought by the demand letter. ATF explained that this "would fill a major void in the tracing system. However, Congress has yet to act on this legislation." *Commerce in Firearms* 26 n.40. Having failed to convince Congress that it should "fill a major void in the tracing system," ATF has undertaken, in the demand letter, to fill that void itself.

ATF's efforts to fill what it refers to as a "major void in the tracing system" is similar to the situation faced by the Fourth Circuit in *NRA v. Brady*, 914 F.2d 475 (4th Cir. 1990) where ATF had argued that, without the challenged regulation, "it will be difficult for BATF inspectors to determine whether the collector properly recorded each firearm disposed of and whether such firearms were disposed of lawfully." 914 F.2d at 484-85. The court responded:

> While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute. The policy arguments forwarded by the Secretary with respect to enforcement "should be directed to the Congress rather than to [the courts]."

Id. at 485, quoting *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963).

The same is true here; if there is "a major void in the tracing system," ATF should address its concern to Congress.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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June, 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J & G SALES LTD,
Plaintiff-Appellee,

v.

CARL J. TRUSCOTT, Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,
Defendant-Appellant.

No. 04-16976
D.C. No.
CV-03-02263-PGR
OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District judge, Presiding

Argued and Submitted
Oct. 20, 2006 - San Francisco, California

Filed January 16, 2007

Before: Sandra Day O'Connor, Associate Justice (Ret.),* and Pamela Ann Rymer, and Sidney R. Thomas, Circuit Judges.

Opinion by Retired Justice O'Connor

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.) sitting by designation pursuant to 28 U.S.C. § 294(a).

COUNSEL

Peter D. Keisler, Assistant Attorney General, Paul K. Charlton, United States Attorney, Michael S. Raab and Lewis S. Yelin (argued), Civil Division, United States Department of Justice; Joel J. Roessner, Deputy Associate Chief, Peter W. Mickelson and Rebekah Holman, Office of the Chief, Bureau of Alcohol, Tobacco, Firearms & Explosives, Washington, DC, for the appellant.

Richard E. Gardiner, Fairfax, VA, for the appellee.

OPINION

O'CONNOR, Associate Justice (Ret.):

The Bureau of Alcohol, Tobacco, Firearms, and Explosives appeals from the district court's grant of summary judgment holding that the Bureau lacks authority to issue a letter requiring a small percentage of licensed firearms dealers to submit portions of their records relating to secondhand firearms. Because we find that the Bureau acted within its statutory authority under 18 U.S.C. § 923(g)(5)(A), we reverse the district court's grant of summary judgment. We affirm, however, the district court's determination that the Bureau did not act in an arbitrary and capricious fashion in deciding which dealers should receive the disputed letter.

I.

The Gun Control Act of 1968, 18 U.S.C. § 921 et seq., requires persons wishing to "engage in the business of

importing, manufacturing, or dealing in firearms" to apply for and obtain a license from the Bureau of Alcohol, Tobacco, Firearms, and Explosives.[1] 18 U.S.C. § 923(a). Successful applicants, known as federal firearms licensees ("FFLs"), must create and maintain detailed records documenting the firearms transactions that they conduct. When FFL dealers receive a firearm they must record "the date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge." 27 C.F.R. § 478.125(e). After selling a firearm, FFL dealers must further record the name and address of the purchaser along with the date of sale. *See id.*

Rather than submitting all of their transaction records to the Bureau, FFLs keep their records on their own premises. This arrangement exists at least in part because the Firearm Owners' Protection Act of 1986 ("FOPA"), see 18 U.S.C. § 926(a), and a rider that has been attached to every Bureau appropriations bill since 1978, *see, e.g.*, Appropriations, 2000-Treasury, Postal Service, Executive Office of the President, and General Government, 114 Stat. 2763, 2763A-129 (2000), forbid the Bureau from establishing a national firearms registry. Despite this ban on creating a

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[1] Although the Gun Control Act initially granted firearms licensing authority to the Secretary of the Treasury, the Secretary delegated this authority to what was then called the Bureau of Alcohol, Tobacco, and Firearms. When Congress passed the Homeland Security Act of 2002, it transferred the licensing authority from the Treasury Department to the Department of Justice, which subsequently delegated the authority to the reconfigured Bureau of Alcohol, Tobacco, Firearms, and Explosives. 28 C.F.R. § 0.130(a)(1). Because any distinction between the two Bureaus is irrelevant to the disposition of this case, we will use the term "the Bureau" to refer broadly to the entity that has assumed responsibility for licensing the firearms industry. *See Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281, 283 n. 3 (4th Cir.2004).

centralized registration system, Congress has authorized the Bureau to maintain at least two sets of transaction records. First, FFLs must submit a report to the Bureau when they sell an unlicensed person two or more of certain firearms within a span of five consecutive business days ("multiple sales"). See 18 U.S.C. § 923(g)(3)(A). Second, FFLs that go out of business must submit their records to the Bureau within thirty days. See 18 U.S.C. § 923(g)(4). In addition, the Bureau is authorized to access FFL records in some instances. *See, e.g.*, 18 U.S.C. § 923(g)(1)(B)(iii) (permitting the Bureau to examine FFL records without reasonable cause or obtaining a warrant when doing so "may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation").

The Bureau relies upon FFL records when it seeks to trace a firearm at the behest of a law enforcement officer. "A crime gun trace begins when a law enforcement official recovers a firearm, usually from a crime scene or from the possession of a suspect, felon or other prohibited person, and the law enforcement agency having jurisdiction of the case submits a trace request to [the Bureau's] National Tracing Center (NTC)." See Bureau of Alcohol, Tobacco, and Firearms, Department of the Treasury, *Commerce in Firearms in the United States* 19 (2000) ("*Commerce in Firearms*"). Using the distinguishing characteristics of the firearm, including its serial number, the NTC begins by searching the records of out-of-business FFLs and by searching multiple sales records. *See id.* at 20. "If these steps do not identify the first retail transaction, the NTC contacts the manufacturer or importer, and tracks the recovered crime gun through the distribution chain (wholesaler and retailer) to the retail dealer, requesting the dealer to examine his records to determine the identity of the first retail purchaser." *Id.*

This tracing system works adequately when the initial retail purchaser of a firearm retains possession of the firearm. If that first purchaser should sell or otherwise transfer the firearm, however, it is "generally impossible" to conduct a trace because "[f]ederal law does not require unlicensed sellers to preserve transfer records." *Id.* at 26. In order to trace a secondhand firearm, authorities must resort to an "investigative trace," which requires time-consuming interviews and the use of informants. *See id.* Because investigative traces are resource intensive and seldom succeed, the Bureau infrequently undertakes such measures in order to trace a secondhand firearm. *See id.* Consequently, while FFLs must maintain records documenting their secondhand firearm transactions, see 27 C.F.R. § 478.125(e), the standard trace fails to uncover this information because there is no link between the first transaction and subsequent transactions. See *Commerce in Firearms* at 26. This gap in the tracing system is important because a large percentage of the firearms sold annually are secondhand firearms.

On February 4, 2000, the Bureau published a comprehensive report that analyzed some of the data regarding trace requests on firearms. *See Commerce in Firearms* (2000). The report noted that in 1998 a small percentage of FFL dealers accounted for the majority of firearms for which traces were conducted. *See id.* at 23.[2] The report further noted that, although the average amount of time between when a firearm is initially sold and when a gun is recovered at a crime scene or when a trace is requested ("time-to-crime") is six years, many traces on firearms occurred within three years of sale or less.

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[2] *Commerce in Firearms* at 23, Table 13, Distribution of Traces among Current Dealers, 1998 (indicating that while just 1.2% of all FFL dealers had ten or more guns traced to them, those dealers accounted for 57.4% of all gun traces).

See id. at 25. "Time-to-crime of three years or less is considered an important trafficking indicator because it suggests that the firearm was rapidly diverted to the illegal market." *Id.* at 21 n. 33.

In order to combat the difficulties of tracing secondhand firearms, the Bureau decided to send demand letters seeking a limited amount of information to the approximately 450 FFL dealers who in 1999 had been linked to ten or more trace requests with a time-to-crime of three years or less. The demand letters obligated members of this select group, who comprised just 0.6% of FFL dealers, to provide the following information regarding secondhand gun acquisitions: the name of the manufacturer and/or importer; the acquisition date; the model; the caliber or gauge; and the serial number. Recipients of the demand letters were expressly directed not to provide either the name of the person from whom the secondhand firearm was acquired or to whom the firearm was transferred.

On August 4, 2003, the Bureau sent J & G Sales, Ltd. ("J & G") such a demand letter because tracing records indicated that 15 or more firearms with a time-to-crime of three years or less had been traced to J & G, an FFL dealer. Letter from the Bureau to J & G at 1 (Aug. 4, 2003). The demand letter explained the difficulties of tracing secondhand guns and suggested the fact that J & G "had a high number of traces of new crime guns with a short 'time-to-crime' may mean that [J & G is] also selling a commensurate number of secondhand guns used in crime." *Id.* The demand letter further instructed J & G to submit its report for 2002 secondhand firearms acquisitions to the NTC within thirty days, and quarterly reports thereafter until it was informed otherwise. *See id.* at 2-3.

On November 18, 2003, J & G opted against releasing the information requested in the demand letter and instead filed a complaint seeking declaratory judgment and injunctive relief against the Bureau. *See J & G Sales, Ltd. v. Domenech*, No. CV 03-2263-PCT-PGR, Order at 3 (D.Ariz., Aug. 5, 2004). With respect to its request for declaratory judgment, J & G asserted that the demand letter exceeded the Bureau's statutory authority, constituted an arbitrary and capricious agency action, and violated due process of law. *See id.* With respect to its request for injunctive relief, J & G sought to prohibit the Bureau from penalizing it for its refusal to comply with the demand letter and to require that the Bureau destroy any records that J & G had already submitted. See id. On January 26, 2004, in response to J & G's complaint, the Bureau filed a document it styled a "Motion to Dismiss or for Summary Judgment," which the district court construed as a Motion for Summary Judgment. See *id.* at 4.

The district court found that the demand letter represented an unlawful request for J & G's records because it fell beyond the scope of the Bureau's statutory authority. *See id.* at 29. Accordingly, the district court enjoined the Bureau from seeking to enforce the letter that it issued to J & G. Despite determining that the Bureau lacked authority to issue the demand letter, the district court granted summary judgment to the Bureau on all other grounds, including that the Bureau's method for targeting particular firearms dealers to receive demand letters was not arbitrary and capricious. *See id.* This appeal followed.

II.

We apply a de novo standard of review to both a district court's grant of summary judgment and questions of statutory interpretation. *See Arizona State Bd. for Charter Schools v.*

United States Dep't of Educ., 464 F.3d 1003, 1006 (9th Cir.2006). "When reviewing an agency's construction of a statute it is charged with administering, we look first to the statutory text to see whether Congress has spoken directly to the question at hand." *Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145, 1146 (9th Cir.2006). If that statutory text clearly reveals Congress's intent, we stop our inquiry there because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

A.

Although this case presents a question of first impression in this circuit, this is not the first time that a federal court of appeals has assessed whether the Bureau possesses statutory authority to send demand letters to FFLs requiring them to provide specified record information. The Court of Appeals for the Fourth Circuit has twice considered-and twice upheld-the Bureau's authority to issue such letters under 18 U.S.C. § 923(g)(5)(A).

In *RSM, Inc. v. Buckles*, 254 F.3d 61 (4th Cir.2001), the Fourth Circuit considered whether the Bureau could, in response to another problem identified in the Commerce in Firearms report, issue demand letters to FFLs who failed to comply adequately with the Bureau's firearms trace requests. *See id.* at 63. These uncooperative FFLs received demand letters because they: "(1) failed to respond to a firearms trace request on at least one occasion; (2) failed to respond to a trace request within 24 hours on three or more occasions; or (3) provided incorrect information in response to a request." *See id.* Noting that just 41 FFLs (less than 0.1% of the 80,000 FFLs in the nation) had been deemed uncooperative, the Fourth

Circuit determined that, while the Bureau's statutory authority to issue demand letters is not boundless, "[n]othing in the relevant statutory framework suggests ... that letters which are narrowly-tailored to facilitate [the Bureau's] trace request authority in criminal investigations run afoul of [the Bureau's] authority under section 923(g)(5)(A) to issue appropriate requests for record information." *Id.* at 63, 67.

In *Blaustein & Reich v. Buckles*, moreover, the Fourth Circuit considered an FFL dealer's challenge to a demand letter requesting information regarding its acquisitions of secondhand firearms, a demand letter seeking substantially the same information as the one at issue here. *See* 365 F.3d 281, 283 (4th Cir.2004). Bob's Gun Shop, the FFL dealer that contested the Bureau's statutory authority in *Blaustein & Reich*, raised almost precisely the same objections to the Bureau's authority as J & G does in the instant matter. The Fourth Circuit rejected each of the arguments disputing the Bureau's authority to issue the demand letter asserted by Bob's Gun Shop. See id. at 287-90. Today, we agree with the Fourth Circuit that § 923(g)(5)(A) authorizes the Bureau to issue such demand letters.

B.

The Bureau grounds its statutory authority to issue the type of demand letter that it sent to J & G Sales in 18 U.S.C. § 923(g)(5)(A). Congress passed that provision when it amended the Gun Control Act with FOPA, part of which-both parties agree-permitted the Bureau to send demand letters to FFL dealers requiring them to submit record information, at least in certain instances. Section 923(g)(5)(A), the demand letter amendment, provides:

> Each licensee shall, when required by letter issued by the [Bureau], and until notified to the

> contrary in writing by the [Bureau], submit on a form specified by the [Bureau], for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the [Bureau] in such letter may specify.

18 U.S.C. § 923(g)(5)(A).[3] Read in isolation, there can be no question that § 923(g)(5)(A) authorizes the Bureau to issue the disputed demand letter.

J & G challenges the Bureau's plain reading of § 923(g)(5)(A) by insisting that this demand letter provision must be read within § 923's broader statutory context. To that end, J & G marshals other statutory provisions that, it contends, effectively demonstrate that the Bureau has exceeded the scope of its statutory authority by sending J & G the demand letter at issue. We turn now to these statutory arguments.

First, J & G contends that the Bureau's understanding of § 923(g)(5)(A) cannot be reconciled with § 923(g)(1)(A), which indicates that FFLs "shall not be required to submit to the [Bureau] reports and information with respect to such records and the contents thereof, except as expressly required by this section." 18 U.S.C. § 923(g)(1)(A). It is certainly true

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[3] This amendment "essentially codified" 27 C.F.R. § 178.126(a), a 1968 regulation requiring FFLs to submit record information when the Bureau seeks it. *RSM*, 254 F.3d at 64. 27 C.F.R. § 478.126(a), which is the current incarnation of 27 C.F.R. § 178.126(a), states in relevant part: "Each licensee shall, when required by letter issued by the Director of Industry Operations, and until notified to the contrary in writing by such officer, submit ... all record information required by this subpart, or such lesser record information as the Director of Industry Operations in his letter may specify." *Id.* Apart from some minor changes in nomenclature, this regulation has remained substantially unchanged since 1968. *See RSM*, 254 F.3d at 64 n. 1.

that § 923(g)(1)(A) limits the Bureau's ability to procure information from FFLs to the express requirements of § 923, but it does not eviscerate the content of § 923(g)(5)(A). As the Fourth Circuit noted in *Blaustein & Reich*, "Section 923(g)(5)(A) contains a condition precedent. It requires an FFL to submit record information to the Bureau but only if the Bureau issues a demand letter requesting it. This condition precedent does not negate the fact that § 923(g)(5)(A) contains an express requirement that is provided for in § 923(g)(1)(A)." 365 F.3d at 287 n. 14.

After analyzing data indicating that a small number of FFL dealers accounted for a majority of firearms that were traced, the Bureau set out to remedy its inability to trace secondhand firearms by using a narrowly-tailored approach. Accordingly, the Bureau sent the demand letter at issue to a small fraction of FFLs and sought only a limited subset of information from FFLs regarding a limited subset of firearms. Whatever the boundaries of the Bureau's authority, the demand letter at issue falls safely within them. In this case, "[i]t is unnecessary ... to delineate the precise scope of [the Bureau's] authority to issue letters to FFLs." *RSM*, 254 F.3d at 67. While Congress has long sought to prohibit the Bureau from establishing a national firearms registry, the Bureau's actions here do not come close to realizing this forbidden goal. Rather, the demand letter at issue seeks a limited amount of information from FFL dealers in order to help remedy the problem posed by tracing secondhand firearms. "While we are not free to ascribe to section 923(g)(5)(A) an open-ended reach, neither are we at liberty to eliminate altogether its positive grant of authority." *Id.*

Second, explicating which provisions it contends are accounted for in § 923(g)(1)(A), J & G asserts that according § 923(g)(5)(A) the reading that the Bureau urges would serve

to nullify two other provisions of the Gun Control Act. These two provisions, J & G contends, make it apparent that the Bureau may request record information from FFLs only in the course of bona fide criminal investigations: (1) a subsection which authorizes the Bureau to "inspect or examine the inventory and records of a[n FFL] without ... reasonable cause or warrant" in particular circumstances, 18 U.S.C. § 923(g)(1)(B);[4] and (2) a subsection that requires FFLs to respond to requests from the Bureau within 24 hours, when the Bureau seeks information regarding a firearm in the course of a criminal investigation, 18 U.S.C. § 923(g)(7).[5] Congress would not have made these specific allowances, J & G asserts, if the Bureau could simply make an end-run around these requirements by issuing demand letters regarding this information pursuant to § 923(g)(5)(A).

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[4] Section 923(g)(1)(B) provides that the Bureau may inspect FFL records in the following instances without having probable cause or needing to obtain a warrant:

> (i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee; (ii) for ensuring compliance with the record keeping requirements of this chapter-(I) not more than once during any 12-month period; or (II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or (iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

18 U.S.C. § 923(g)(1)(B).

[5] Section 923(g)(7) provides in relevant part: "Each [FFL] shall respond immediately to, and in no event later than 24 hours after the receipt of, a request ... for information contained in the records ... as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation." 18 U.S.C. § 923(g)(7).

Each of these provisions, however, serves quite distinct purposes from the demand letter. Section 923(g)(1)(B) governs when Bureau officials may physically gain entry onto an FFL's premises in order to inspect record information. When the Bureau merely sends a demand letter requesting certain limited information, no physical intrusion whatsoever occurs. This is a difference that matters. See *RSM*, 254 F.3d at 66 ("The statutory scheme makes clear that section 923(g)(1)(B) is aimed at preventing warrantless, on-site searches of FFLs' records. In contrast, issuance of a letter under section 923(g)(5)(A) does not involve the entry of [Bureau] agents onto an FFL's premises."). Similarly, § 923(g)(7) imposes speedy reporting requirements on FFLs in the context of criminal investigations, and neither explicitly nor implicitly serves to limit the Bureau's power under § 923(g)(5)(A). *See Blaustein & Reich*, 365 F.3d at 287 n. 13 ("[Section] 923(g)(7) does not limit the Bureau's authority to issue demand issue letters like the one issued to Bob's Gun Shop."); *see also RSM*, 254 F.3d at 66 ("Section 923(g)(7) does not purport either to address or restrict [the Bureau's] section 923(g)(5)(A) authority to issue letters. Instead, it establishes the duties of FFLs when they receive a trace request."). Rather than the Bureau attempting to transform these aforementioned provisions into nullities, it is J & G who seeks to strip § 923(g)(5)(A) of its independent meaning.

Finally, J & G advances an argument involving two statutory provisions that Bob's Gun Shop does not appear to have advanced in *Blaustein & Reich*. If § 923(g)(5) is accorded the reading that the Bureau urges, J & G contends that §§ 923(g)(3)(A) and (g)(4) would be rendered superfluous. Section 923(g)(3)(A) requires FFLs to submit a report to the Bureau when it sells an unlicensed person two or more of certain firearms within a span of five consecutive business days. Section 923(g)(4) requires firearms businesses that go out

of business to submit their records to the Bureau within thirty days.

Simply because some provisions of § 923 impose specific duties upon FFLs to respond to certain requests within a specified time frame and to provide record information sua sponte does not mean that the Bureau is prohibited from seeking further FFL record information by demand letter. Nothing in the statute suggests that the Bureau's authority extends only to the statutory provisions that J & G agrees to recognize. And we decline J & G's invitation to so limit that authority.

Because we find that -- even after considering § 923(g)(5)(A) in its broader context -- the statute is clear, we need not address J & G's exhaustive discussion of 18 U.S.C. § 923's legislative history. See *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

C.

Turning beyond the confines of § 923, J & G also contends that the Bureau's issuance of the demand letter here conflicts with Congress's prohibition on new rules or regulations regarding FFL records articulated in 18 U.S.C. § 926(a). That provision provides in relevant part:

> No such rule or regulation prescribed after the date of the enactment of [FOPA, May 19, 1986,] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States ..., nor that any

> system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

18 U.S.C. § 926(a). Because the Bureau had not previously issued demand letters to FFLs in precisely this fashion, J & G asserts, its action "is, in effect, a new regulation." Appellee's Br. at 33.

By the very terms of the statute, however, § 926(a) cannot be understood to limit the Bureau's authority to issue demand letters under either § 923(g)(5)(A) or 27 C.F.R. § 478.126(a). *See Blaustein & Reich*, 365 F.3d at 288. Section 926(a) has no bearing on § 923(g)(5)(A) because the former provision pertains only to "rule[s]" and "regulation[s]" and the latter is a statute, not a rule or regulation. *See id.; see also id.* at 290 ("Section 926(a) prohibits a federal agency from prescribing new rules or regulations that require FFLs to report their records."). Moreover, § 926(a) has no bearing on 27 C.F.R. § 478.126(a) because it prohibits the promulgation of rules and regulations prescribed only after May 19, 1986, and the regulation at issue dates back to 1968. *See id.* at 288. Although before 2000 the Bureau had never previously issued demand letters precisely like the one at issue here, that does not mean that the agency lacked regulatory authority to issue J & G the contested letter. Nor was the demand letter a new "rule or regulation" simply because it represented a departure from the Bureau's prior interpretation of its authority, as J & G suggests. See *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327, 1334 (9th Cir.1997). Thus, § 926(a)'s provision barring new rules and regulations is plainly inapposite to the discussion at hand.

III.

Aware that this court could reverse the district court's statutory holding, J & G also urges affirmance on the ground that the Bureau's issuance of a demand letter in these particular circumstances constitutes arbitrary and capricious agency action, in violation of 5 U.S.C. § 706(2)(A). In essence, J & G contends that the demand letter at issue is a shot in the dark. We disagree.

When reviewing an agency action to determine whether it is arbitrary and capricious, our scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). In this court, the review of whether an agency's action "was arbitrary or capricious is highly deferential, presuming the agency action to be valid." *Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 830-31 (9th Cir.2002) (internal quotation marks omitted). The agency must, of course, "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). While we may not remedy deficient agency actions, courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (internal quotation marks and citations omitted). Moreover, "[w]here the agency's line-drawing does not appear irrational and the [party challenging the agency action] has not shown that the consequences of the line-drawing are in any respect dire ... [courts] will leave that line-drawing to the agency's discretion." *Leather Indust. of Am. v. EPA*, 40 F.3d 392, 409 (D.C.Cir.1994).

J & G proposes four distinct theories contending that the Bureau's issuance of the contested demand letter constitutes arbitrary and capricious agency action. First, J & G contends

that the demand letter asserted, without any basis in fact, that "crime guns" seized from "crime scenes" had been traced to it. The crux of this contention is that the Bureau sometimes conducts traces on guns that were not in fact used in crimes. Because the records submitted by the Bureau to the district court under seal were heavily redacted, J & G suggests, the district court could not determine whether the sixteen firearms traced to J & G were actually "crime guns." But J & G's effort to dispute whether the sixteen firearms in question were in fact "crime guns" falters because that is a term of art, which the Bureau invokes to refer to any gun that is the subject of a trace request. The Bureau traces firearms at the behest of law enforcement officials, and it seems safe to assume that law enforcement officials do not generally opt to have traces conducted out of idle curiosity. Even if that assumption is proven incorrect, however, we cannot fault the agency simply for seeking a limited subset of information from FFLs that were connected to a large number of traced guns. Although the Bureau might have selected a broader term than "crime gun" to describe firearms that had been traced by law enforcement officials, mere linguistic imprecision does not render an agency's action arbitrary and capricious.

Second, J & G claims that the Bureau's threshold of firearm traces for determining which FFL dealers would receive the demand letter should have taken into account overall sales volume. Under this theory, FFL dealers that sell a large number of firearms may receive a demand letter even if a comparatively small percentage of its firearms ended up having a trace conducted. While the Bureau certainly could have considered what percentage of firearms sold ended up being traced in order to establish a threshold for issuing the demand letter, the Bureau's decision to rely instead on an absolute number of traces does not render the action arbitrary and capricious. The agency need not craft the perfect threshold

in order to survive review, but merely demonstrate that its threshold stems from reasoned decisionmaking. This, the agency has done.

Third, J & G contends that the Bureau acted impermissibly when it increased the triggering threshold of firearms traces from ten to fifteen in 2002. As a preliminary matter, it is unclear why J & G seeks to challenge the increased threshold because, with its sixteen traced guns with a time-to-crime of three years or less, J & G would have received a letter under either threshold. Moreover, as the Bureau notes, the data that the agency relied upon from the *Commerce in Firearms* report to establish the ten-trace threshold also supported the fifteen-trace threshold. See *Commerce in Firearms* at 23, Table 13, Distribution of Traces among Current Dealers, 1998. J & G has not demonstrated why fifteen traced firearms established an irrational threshold, and we can find no reason to upset the agency's decision.

Fourth, J & G asserts that the Bureau incorrectly thought that it could extrapolate from data regarding traces conducted on new firearms to traces conducted on secondhand firearms. But as the Fourth Circuit observed in *Blaustein & Reich*: "[T]he Bureau reasonably deduced that since [a] small group of dealers was the original source of a disproportionate share of the new firearms that were traced, this same group might also be the source-through illegal or legal means-of a substantial percentage of secondhand firearms that are traced." 365 F.3d at 291. We can think of no reason, and J & G has not offered one, to believe that an FFL dealer who sells a large number of new firearms that end up being traced would not similarly sell a large number of used firearms that also end up

being traced.[6]

Thus, we agree with the district court that the Bureau's issuance of the demand letter to J & G in these particular circumstances did not constitute arbitrary and capricious agency action.

IV.

For the foregoing reasons, we reverse the district court's grant of summary judgment and hold that the Bureau possessed statutory authority to issue J & G the letter demanding the specified record information regarding its secondhand firearms transactions. We affirm the district court's determination that the Bureau's issuance of a demand letter to J & G in these circumstances did not constitute arbitrary and capricious agency action.

AFFIRMED IN PART AND REVERSED IN PART.

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[6] The demand letter did provide an exemption from reporting for FFL dealers who do not sell secondhand firearms. See Letter from the Bureau to J & G at 4.